Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-2062

DENNIS ROY CHOATE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner, Dennis Roy Choate, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 21, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, designated for publication, but not yet reported, appears in the Appendix hereto. No opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 21, 1980. A timely petition for rehearing en banc was denied on June 3, 1980. This petition is filed within thirty days of that date. The jurisdiction of this Honorable Court is invoked under Title 28, United States Code § 1254(1).

QUESTION PRESENTED

Does this Court's decision in United States v. Caceres (1979) 440 U.S. 741 preclude suppression of evidence obtained

by a mail cover where the violation of the agency regulation consists of submitting an application containing intentionally false statements, in violation of a federal perjury statute?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code § 1001 provides as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

On August 21, 1974, petitioner was charged with two counts of understating his income on federal income tax returns in violation of Title 26, United States Code, § 7201. He pled not guilty and moved to dismiss the indictment upon the basis, in part, that his attorney-client relationship had been violated by the illicit activities of a paid government informant. The District Court, the Honorable Warren J. Ferguson, Judge Presiding, conducted an evidenciary hearing and thereafter granted the motion to dismiss. The Court of Appeals reversed, holding that the evidence had failed to establish that petitioner's Sixth Amendment rights had been infringed. (United States v. Choate, [9th Cir. 1975] 527 F.2d 748).

On remand, the District Court conducted an evidenciary hearing upon petitioner's motion to suppress all of the government's evidence against him. The basis of the motion was that said evidence had been obtained by a mail

cover of petitioner's correspondence, which mail cover violated petitioner's Fourth Amendment rights. The District Court agreed and granted the motion to suppress. (United States v. Choate, [C.D. Cal. 1976] 422 F.Supp. 261).

On appeal by the government, the Court of Appeals, over Judge Hufstedler's dissent, again reversed the District Court, ruling that the mail cover did not impermissibly invade any reasonable expectation of privacy. (United States v. Choate, [9th Cir. 1978] 576 F.2d 165). The opinion of the Ninth Circuit, however, at page 173 thereof, specifically noted that the veracity of the mail cover application had not been called into question and thus found that it would be inappropriate for the Court of Appeals to determine the truthfulness of that document.

With this caveat in mind, the petitioner, on remand, again moved the District Court to suppress all of the evidence, alleging with specificity, and offering to prove, that the entirety of the mail cover application was permeated with intentionally false statements

without which no mail cover could have or would have been obtained. To that effect, the defense showing set forth numerous specified areas of separate and distinct intentional false statements.

At the hearing on the motion, the District Court refused to permit petitioner to introduce any evidence to the effect alleged and denied the motion to suppress. The ruling of the District Court was that based on the decision of this Honorable Court in United States v. Caceres (1979) 440 U.S. 741, and the decision of the Ninth Circuit in its previous decision, United States v. Choate, (9th Cir. 1978) 576 F.2d 165, proof of said allegations could not result in the supression of the evidence. The rationale was that Choate II established that mail covers fall outside the ambit of the Fourth Amendment, and that while intentionally false statements would violate postal regulations, Caceres did not permit suppression of evidence for non-compliance with agency rules.

On appeal following the determination of guilt by the District Court upon

stipulated facts, the Ninth Circuit affirmed the ruling of the lower court denying the motion to suppress evidence. The rationale of the Court of Appeals corresponded to that adopted by the District Court, to the effect that under Choate II and Caceres, the exclusionary rule was inapplicable as the submission of intentionally false statements to the government agency did not itself violate the federal Constitution, but rather violated only agency regulations, the breach of which was not shown to have affected petitioner's conduct. (Appendix, page 3).

It is this erroneously narrow and fundamentally unjust misconstruction of the standards set forth in Caceres which the instant petition challenges.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS TOTALLY AT VARIANCE WITH THIS COURT'S DECISION IN UNITED STATES v. CACERES, IMPERMISSIBLY SANCTIONS PERJURY COMMITTED BY GOVERNMENT AGENTS IN VIOLATION OF FEDERAL STATUTE, AND OBTAINS A FUNDAMENTALLY UNJUST RESULT.

The decision of this Honorable Court in United States v. Caceres (1979) 440 U.S. 741 was carefully crafted. It established that the question of whether a violation of agency regulations would result in the suppression of evidence thereby obtained was to be determined on a case by case basis, and concluded that on the facts there presented, suppression was unwarranted.

The facts found significant by this Court in Caceres are easily gleaned from the language of that opinion. There the acts which constituted the violation implicated neither the federal Constitution nor any federal statute. The agents' actions were reasonable, and in good faith, in a situation where no one

questioned that monitoring was appropriate, and authorization would have been forthcoming even absent the disputed action. Further, said violation was technical in nature, involving a legal interpretation of a complexly drafted regulation, and took place in an emergency situation where the activity complained of was approved by higher agency officials.

The facts presented in the case at bench are far removed from those established in Caceres. Here, the petitioner alleged in detail, and offered to prove with specificity, that all of the government's evidence was the product of a mail cover issued by postal authorities upon written application of a govenment agent, which application was replete with separate and distinct and intentionally false statements, in violation of federal perjury statutory law, and without which false statements the cover would not have been issued and the evidence would not have been obtained.

Given proof of these facts, Caceres all but mandated suppression of the

evidence obtained by the mail cover. First, while we do not attempt to write here the definitive constitutional treatise as to whether use of evidence obtained by a perjured federal application directly offends the Fifth Amendment Equal Protection or Due Process clauses, or the Fourth Amendment itself, it seems clear that such activity at least "implicates" those provisions within the meaning with which that term is employed in Caceres.

Second, the activities here complained of constituted a clear violation of the federal false statement statute, Title 18, United States Code § 1001.[1/]

1/ This section reads as follows:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000, or imprisoned not more than five years, or both."

The existence of an element of this nature is one which Caceres plainly categorizes as warranting suppression of the evidence obtained. As this Court expressly stated in Caceres, at 99 S.Ct. 1473, footnote 21, had a violation of a federal statute been made out, this Court's earlier decision in Miller v. United States (1958) 357 U.S. 301, authorizing suppression of evidence obtained by violation of federal statute, would have been controlling.

Finally, not only are none of the other factors relied upon in Caceres present in the case at bench; rather the record makes clear that in each instance, the polar opposite of every such factor was established. To paraphrase Caceres, the use of intentionally false statements here was not reasonable, not in good faith, not in a situation where the true facts warranted a finding that monitoring was appropriate, and authorization would not have been forthcoming absent the perjury. The violation was not technical in nature, was not occasioned in an emergency situation, and was not approved by higher officials.

The decision of the Ninth Circuit in the case at bench so severely distorts these three areas of this Court's ruling in Caceres that the parent decision is no longer recognizable. As interpreted by the Court of Appeals here, Caceres stands for the proposition that suppression issues stemming from violations of agency regulations are not to be determined on a case by case basis. Rather, unless the violation of the agency regulation concomitantly directly violates the Constitution, suppression of evidence obtained thereby may not be ordered. This result further is to be uniformly achieved without consideration of the nature of the violation or the application of any relevant statutory framework.

In this context, the case at bench directly presents a federal issue of substantial magnitude. The decision of the Court of Appeals, by erroneously construing the essence of this Court's decision in Caceres, thus determines that government agents may obtain evidence for use in a criminal prosecution by use of perjured statements in violation of a

federal statute directly forbidding the same, without fear that said evidence will be suppressed at trial. The decision thus not only obtains a fundamentally unjust result, but calls into disrepute the entire Governmental function.

This Court should grant the relief requested to remedy the dangerous implications of the decision of the Court of Appeals.

CONCLUSION

For all of the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

RICHARD G. SHERMAN

Counsel for Petitioner

APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 21 1980

RICHARD H. DEANE
Clerk, U.S. Court
of Appeals

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	) No. 79-1505
DENNIS ROY CHOATE, Defendant-Appellant.	) OPINION

Appeal from the United States District Court for the Central District of California

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Before: MERRILL and ALARCON, Circuit Judges, and TEMPLAR,* District Judge.

Per Curiam

This is the third appeal to this court involving a two-count indictment in which

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*Honorable George Templar, Senior United States District Judge for the District of Kansas, sitting by designation.

defendant-appellant was charged in each count with income tax evasion. Twice, motions of defendant to dismiss were sustained by the trial court and in each instance, the dismissals were reversed. (United States v. Choate, 527 F.2d 748 (9th Cir. 1975) (I), and United States v. Choate, 576 F.2d 165 (9th Cir. 1978) (II). On remand, defendant moved to dismiss the indictment, claiming impermissibly discriminatory law enforcement and error by the trial court in refusing to suppress evidence resulting from the use of a "mail cover" obtained by an application which allegedly contained intentional false statements, thus violating applicable postal regulations. The motion to dismiss was overruled. A jury having been waived, the case was submitted to the court on stipulations. Defendant offered no evidence and was found guilty by the court. A motion for a new trial was denied and the defendant was sentenced. This appeal followed.

THE MAIL COVER ISSUE

Defendant seeks to have this court reconsider its decision in United States v. Choate, 576 F.2d 165. The elaborate opinion in that case discloses that this court considered at length and in detail the contention advanced by defendant that the use of the mail cover in this case was in violation of Postal Regulations; that the use of the mail cover allegedly obtained violated his constitutional rights under the First, Fourth and Ninth Amendments. A repetition of the court's holdings on these issues would add nothing to the body of the law on the subject of mail covers so ably considered in the earlier appeal (Choate II).

The defendant now urges us to determine that the trial court should have suppressed the evidence resulting from the mail cover because the agent made intentionally false statements to the postal authorities in his request for the cover. Defendant contends that when his latest motion to suppress was presented, he should have been afforded a hearing

to establish the intentional falsity of the statements contained in the application of the agent for a mail cover and a determination that evidence developed through information obtained by the mail cover should have been suppressed. Basically, defendant insists that he is entitled to the protection of regulations promulgated by the Postal Department[1/]

1/ 39 C.F.R. § 233.2(e)(1)(ii)(1975). A parallel provision gives the Chief Postal Inspector the added authority to order mail covers when necessary to protect the national security:

> (2) The Chief Postal Inspector, or his designee, may order mail covers under the following circumstances:
>
> (i) When he has reason to believe the subject or subjects of the mail cover are engaged in any activity violative of any postal statute.
>
> (ii) When written request is received from any law enforcement agency wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover is necessary to (A) protect the national security, (B) locate a fugitive, or (3) obtain information regarding the commission or attempted commission of a crime.
>
> 39 C.F.R. § 233.2(d)(2)(1975).

and that when violated by an agent of the government, any information obtained must be suppressed. But this contention is contrary to the holding in United States v. Choate (II), where it was decided that no constitutional inhibition was involved in the use of a mail cover in this instance.

The court below in denying defendant's motion ruled that the exclusionary rule did not apply in this case, relying on Choate (II) and United States v. Caceres, 440 U.S. 741 (1979). We believe the trial court correctly applied the law announced in the majority opinion in Choate (II) and in United States v. Caceres, supra.

Here, none of defendant's constitutional rights were violated. Cf. Smith v. Maryland, 47 U.S.L.W. 4779, June 20, 1979, 99 S.Ct. 1682.

Defendant contends that the alleged falsity of the request for mail cover made on July 19, 1972, by Customs Agent Williams violated postal regulations and required suppression of evidence obtained

by virtue of its use. Even if it be established that the request contained false statements, suppression of the evidence obtained would not be required.

Where violation of an agency regulation does not raise a constitutional question and defendant "cannot reasonably contend that he relied on the regulation, or that its breach had any effect on his conduct," he may not in a criminal prosecution "seek judicial enforcement of the agency regulation by means of the exclusionary rule." This was the reasoning in Caceres and it was correctly followed by the court below in this case. No hearing was required under such circumstances.

NO DISCRIMINATORY LAW ENFORCEMENT

Defendant argues that the trial judge should have ordered an evidentiary hearing on the issue of discriminatory law enforcement because the Internal Revenue Service violated its policy of not prosecuting persons who voluntarily disclose and rectify false statements in their tax returns. Defendant's argument is based

on a misunderstanding of the current Revenue Service policy.

In January 1972, three weeks before I.R.S. began its investigation of Choate, the treasury department changed its voluntary disclosure policy. In announcing the change, the Department of Justice Manual for Criminal Tax Trials, Chapter 1, page 5, reads:

> "It is therefore no longer an administrative basis for declining prosecution in the Revenue Service that a prospective defendant voluntarily revealed his tax fraud to an appropriate official of that Service before any investigation of his affairs had begun. Now the fact that a taxpayer seeks voluntarily to rectify a false return is given some weight but is not conclusive of the issue."

Because there was no longer a policy affording immunity for voluntary disclosure, the defendant's argument that I.R.S. failed to follow its own administrative policies in prosecuting him fails. Cf. Sullivan v. United States, 348 U.S. 179 (1954).

To prove discriminatory prosecution, one must establish that the selection of a suspect was deliberately based on an unjustifiable standard, such as race, religion, or other arbitrary classification. Oyler v. Boyles, 368 U.S. 448, 456 (1962). This rule has been enlarged upon by the Ninth Circuit. "[The defendant] must show that his selection was based on an impermissible ground such as race, religion or exercise of his first amendment right to free speech [citations omitted]." United States v. Scott, 521 F.2d 1188, 1195 (1975), cert. denied, 424 U.S. 955 (1976).

The appeal of the defenant does not present a claim that his prosecution was based on his exercise of a first amendment right, nor does he assert that the prosecution was instituted because of his race or religion. Instead he claims he was prosecuted because he was suspected of another offense which the attorneys for the government felt they could not prove at the time.

Under these circumstances, there is no discriminatory prosecution and no denial of Equal Protection of the law. As was so well stated in United States v. Manno, 118 F.Supp. 511 (N.D. Ill. 1954):

> [C]itizens are entitled to equal protection of the law, but these decisions do not hold that citizens are entitled to equal protection from the laws. The fact that not all criminals are prosecuted is no valid defense to the one prosecuted . . . [T]he administration of such a matter lies in the discretion of the prosecuting attorney.
>
> Id. at 515

It is not irrational in a world where resources do not permit prosecution of every suspected criminal that the government would give high priority to prosecuting those who, in addition to being suspected of tax evasion, were also suspected of other serious offenses. Such a standard operates to reduce crime more effectively than a policy based on random enforcement.

Because the defendant has not set forth a cognizable claim of discriminatory

law enforcement, the trial court did not err in denying the evidentiary hearing on the claim.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

F I L E D

JUN 3 1980

RICHARD H. DEANE
Clerk, U.S. Court
of Appeals

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. DENNIS ROY CHOATE, Defendant-Appellant.	D.C. No. CR 74-1250 WJF C.A. No. 79-1505 O R D E R

Before: MERRILL and ALARCON, Circuit Judges, and TEMPLAR, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Alarcon has voted to reject the suggestion for rehearing en banc and Judges Merrill and Templar have recommended such rejection.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b)

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.